

HUNG MOY v. ANG CHA HOOI

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
HADHARIAH SYED ISMAIL JCA
MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NO: W-02(IM)-1081-06-2019]
28 MAY 2021

FAMILY LAW: Decree nisi – Setting aside – Application for – Wife filed contested petition for divorce – Petition served by way of substituted service – Husband did not attend petition nor file defence – Petition allowed and wife granted decree nisi and decree nisi absolute – Husband applied to set aside decree and decree nisi absolute seven years later – Whether service of divorce petition and notice of hearing proper – Whether there was inordinate delay in filing application to set aside – Whether decree nisi and decree nisi absolute could be rescinded or set aside – Law Reform (Marriage and Divorce) Act 1976

The appellant and the respondent married in 1977 and were blessed with a son and a daughter. The parties lived together until 2008 when the respondent left, following a quarrel with the appellant. In 2009, the appellant filed a contested petition for divorce at the High Court and the petition was served by way of substituted service. The petition was heard in 2010 but the respondent did not attend the hearing nor filed his defence. The High Court allowed the petition and granted *decree nisi* with the following terms: (i) custody, care and control of their daughter, who was born with down syndrome and required constant care and supervision, were granted to the appellant; (ii) the respondent was denied access to their daughter; (iii) the half share held by the respondent in their matrimonial property was sold to third parties, without the need for the respondent's permission, as their daughter's maintenance; and (iv) a car, registered under the respondent's name, was transferred to the appellant. The *decree nisi* was made absolute in 2010. According to the respondent, he only knew of the divorce through their son, at the end of 2015. In 2017, following an application to the High Court, the respondent successfully set aside the *decree nisi* and the *decree nisi* absolute. Hence, the present appeal. In support of her appeal, the appellant submitted that (i) the service of the divorce petition and notice of hearing on the respondent was proper; (ii) there was a delay of seven years on the part of the respondent; (iii) there is no provision in the Law Reform (Marriage and Divorce) Act 1976 ('Act') which provides for the rescission or setting aside of a *decree nisi*; and (iv) the cancellation of the *decree nisi* changed the status of the appellant who had since remarried.

A Held (allowing appeal)**Per Hadhariah Syed Ismail JCA delivering the judgment of the court:**

- B** (1) Attempts were made by the process server to serve the divorce petition and other cause papers personally on the respondent at his last known address. The appellant then applied and obtained a court order to serve the divorce petition on the respondent by way of substituted service. The court order was duly complied with by the appellant by posting a copy of the divorce petition on the court's notice board, his last known address and in the newspaper. Therefore, the court order for substituted service was proper and valid. It followed that the service of the petition and other cause papers on the respondent was proper. (paras 19, 22 & 23)
- C**
- D** (2) The respondent, who was constantly in contact with their son, must have known about the divorce much earlier than 2015. However, he did nothing. From the date of the *decree nisi* was granted, in 2010, to the date of the application, in 2017, there was an inordinate delay of more than seven years. Assistance will not be lent to a litigant who slept on his rights. (para 29)
- E** (3) The High Court erred in setting aside the *decree nisi* and the *decree nisi* absolute. There is no provision in the Act for rescinding or setting aside a *decree nisi* that already had been made absolute. It is the intention of Parliament to preserve the integrity and finality of a *decree nisi* that has already been absolute after three months. As such, parties are not allowed to freely apply to the court at any time to rescind or set it aside unless for very good reasons or in exceptional circumstances. The respondent had no good reasons to set aside the *decree nisi* and *decree nisi* absolute. (paras 31 & 37)
- F**
- G** (4) The *decree nisi* and *decree nisi* absolute were reinstated. The order was unfair to the respondent; the appellant had taken away the respondent's car and part of the respondent's equal share to the matrimonial property and had denied the respondent access to their daughter. However, the respondent was not without remedy. He was at liberty to apply to the court to vary the order for custody or maintenance of their daughter under s. 96 of the Act. (paras 38 & 39)
- H** **Case(s) referred to:**
Wong Cheng Ping v. Chin Guan Seng [2010] 10 CLJ 743 HC (*refd*)
- Legislation referred to:**
Law Reform (Marriage and Divorce) Act 1976, ss. 7, 61, 96
Rules of Court 2012, O. 13
- I** *For the appellant - N Subramaniyan & Lum Chee Seng; M/s Lum Chee Seng & Assocs*
For the respondent - Mary M Anthony & Zarina Begum; M/s MM Anthony

[Editor's note: Appeal from High Court, Kuala Lumpur; Divorce Petition No: S8-33-951-2009 (overruled).]

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Reported by Najib Tamby

JUDGMENT

Hadhariah Syed Ismail JCA:

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Introduction

[1] The appeal by the appellant is against the decision of the High Court given on 17 April 2019, allowing the respondent's notice of application (encl. 36) to set aside the *decree nisi* dated 2 June 2010 and certificate making *decree nisi* absolute dated 3 September 2010 with costs.

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Background Facts

[2] The appellant, 69 years old now, is a retired teacher with a monthly pension of RM1,300. She now works as a private tuition teacher.

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[3] The respondent, 71 years old now works as an estate agent and security official in Penang.

[4] The appellant and the respondent were married on 23 December 1977. Out of the marriage, they had two children:

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(i) Ang Chuan Lek, a son aged 42 years old now; and

(ii) Ang Shin Jee, a daughter aged 33 years old now.

[5] Ang Shin Jee was born with "down syndrome" and is mentally disabled. She requires constant care and supervision. This fact is admitted by the respondent.

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[6] The appellant and the respondent had lived together at No. 9, Jalan Bukit Desa 2, Taman Bukit Desa, 58100 Kuala Lumpur until 3 June 2008 when the respondent left the house after a quarrel with the appellant.

[7] The couple jointly owned a matrimonial shop house known as No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Kuala Lumpur with each party held equal share. The original land title of this shop house was in the possession and custody of the respondent.

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[8] On 2 July 2009, the appellant filed a contested petition for divorce in Kuala Lumpur High Court.

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[9] The petition was served by way of substituted service as ordered by the court order dated 15 September 2009.

[10] The petition was heard on 2 June 2010. The respondent did not attend nor defended the hearing.

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A [11] The High Court allowed the petitioner's petition and granted the *decree nisi* on 2 June 2010 with the following terms:

- (i) Pemeliharaan, jagaan dan kawalan ke atas anak perempuan, Ang Shin Jee diberikan kepada pempetisyen sehingga anak perempuan tersebut tidak lagi berada dalam keadaan hilang upaya.
- B (ii) Setengah bahagian hak responden atas apartmen bersama-sama setengah bahagian hak pempetisyen di atasnya yang dipegang di bawah Hakmilik Strata Geran 15135/M5/4/249, No. Petak 249 dalam Tingkat 4, Mukim Kuala Lumpur, Lot 51565, Daerah Wilayah Persekutuan dan beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Taman Desa, 58100 Kuala Lumpur dijual kepada pihak ketiga dengan terma-terma ditentukan oleh pempetisyen tanpa persetujuan responden diperlukan dan setengah bahagian hasil jualan kepunyaan responden sahaja digunakan untuk membiayai nafkah anak perempuan tersebut.
- C (iii) Penolong Kanan Pendaftar Mahkamah diberi kuasa untuk menandatangani dan menyempurnakan perjanjian jual beli dan pindah milik dan segala suratcara yang lain berkenaan setengah bahagian hak responden dalam apartmen tersebut bagi pihak responden.
- D (iv) Kereta nombor pendaftaran WHE 5671 atas nama responden dipindahmilik kepada pempetisyen.
- E (v) Responden tidak dibenarkan akses kepada anak perempuan tersebut.

[12] *Decree nisi* was made absolute on 3 September 2010.

F [13] On 8 December 2017, the respondent filed the application to set aside the *decree nisi* and the *decree nisi* absolute.

[14] On 22 January 2019, the respondent married pastor Bennet Lopez. The marriage was registered on the same date.

Respondent's Notice Of Application

G [15] In the notice of application (encl. 36), the respondent prayed for the following orders:

- (i) Bahawa responden suami iaitu Ang Cha Hooi diberikan kebenaran membuat permohonan ini untuk mengetepikan perintah penyampaian ganti bertarikh 15 September 2009.
- H (ii) Selaras dengan perintah mengetepikan perintah penyampaian ganti bertarikh 15 September 2009, untuk mengetepikan *decree nisi* bertarikh 2 June 2010.
- I (iii) Selaras dengan perintah mengetepikan *decree nisi*, sijil menjadikan *decree nisi* mutlak bertarikh 3 September 2010 juga diketepikan.

- (iv) Selaras dengan mengetepikan perintah *decree nisi* dan *decree nisi* mutlak, maka perintah bertarikh 16 November 2015 bagi pengeluaran hakmilik baru bagi hartanah beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Kuala Lumpur diketepikan. A
 - (v) Suatu perintah untuk mengetepikan perintah bertarikh 16 November 2015 yang diperolehi untuk membatalkan dan menjadikan “null and void” geran hakmilik bagi hartanah beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Kuala Lumpur yang berada dalam simpanan dan pegangan responden. B
 - (vi) Satu perintah untuk pempetisyen mendedahkan sebarang atau lain-lain perintah yang diperolehi berkaitan dengan hartanah beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Kuala Lumpur. C
 - (vii) Satu perintah untuk pempetisyen mendedahkan status hakmilik geran bagi hartanah beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Kuala Lumpur. D
 - (viii) Satu perintah untuk pempetisyen mengemukakan kepada mahkamah dan responden suratan hakmilik baru (sekiranya dikeluarkan) yang dikeluarkan oleh Pendaftar Hakmilik Tanah dan Galian Wilayah Persekutuan Kuala Lumpur terhadap hartanah yang beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Taman Desa, 58100 Kuala Lumpur; E
 - (ix) Bahawa responden suami diberikan kebenaran membuat permohonan ini untuk memasukkan satu kaveat persendirian terhadap hartanah perkahwinan yang beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Taman Desa, 58100 Kuala Lumpur sehingga isu hartanah perkahwinan di dalam petisyen perceraian di antara responden dan pempetisyen diputuskan dengan muktamad oleh mahkamah; F
 - (x) Dan/atau secara alternatif *status quo* hartanah perkahwinan yang beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Taman Desa, 58100 Kuala Lumpur dikekalkan sehingga petisyen perceraian di antara pempetisyen dan responden diputuskan dengan muktamad oleh mahkamah. G
 - (xi) Pempetisyen dilarang dan/atau dihalang untuk mengadakan sebarang urusan terhadap hartanah yang beralamat No. 42C, Jalan Desa Bakti, Taman Desa Town Centre, Kuala Lumpur termasuk sebarang penjualan, memohon untuk geran baru dan/atau penyewaan hartanah tersebut sehingga petisyen perceraian di antara pempetisyen dan responden diputuskan dengan muktamad oleh mahkamah. H
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- A (xii) Satu perintah untuk pempetisyen mendedahkan *status quo* sebuah kereta kancil bernombor WHE 5671 yang dibeli oleh responden untuk penggunaan pempetisyen yang mana kereta tersebut adalah harta perkahwinan.
- B (xiii) Satu perintah untuk mengekalkan *status quo* kereta kancil bernombor WHE 5671 tersebut sehingga petisyen perceraian di antara pempetisyen dan responden diputuskan dengan muktamad oleh mahkamah.
- (xiv) Satu perintah untuk pempetisyen mendedahkan tempat tinggal Ang Shin Jee.
- C (xv) Satu perintah untuk membenarkan responden berjumpa dengan Ang Shin Jee serta merta tanpa kehadiran pempetisyen.
- (xvi) Satu perintah untuk pempetisyen mendedahkan samaada Ang Shin Jee yang berada di bawah penjagaan, pemeliharaan dan kawalan pempetisyen telah dibenarkan akses kepada pastor Bennet, ahli-ahli keluarga pastor Bennet, ejen-ejen pastor Bennet dan pekerja-pekerja pastor Bennet.
- D (xvii) Kos permohonan ini ditanggung oleh pempetisyen.
- E (xix) Lain-lain relief yang difikirkan sesuai dan wajar oleh mahkamah.

[16] On 17 April 2019, the High Court allowed prayers (ii) and (iii) in encl. 36.

[17] Findings Of The High Court

- F (i) Pempetisyen telah menyempurnakan serahan petisyen perceraian sebagaimana perintah mahkamah.
- (ii) Penjelasan responden mengenai kelewatan iaitu responden hanya mengambil tindakan setelah diserahkan semua dokumen berkaitan diterima oleh mahkamah.
- G (iii) Perceraian dibuat secara rahsia.
- (iv) Responden mempunyai pembelaan bermerit.

The Appeal

- H [18] In the amended memorandum of appeal, the appellant relies on 26 grounds to support her appeal. But, we summarised them into four broad grounds and they are:

- (i) Service of the divorce petition dated 2 July 2009 and notice of hearing dated 7 January 2010 on the respondent was proper.
- I (ii) There was a delay of seven years on the part of the respondent.

- (iii) There is no provision in the Law Reform (Marriage and Divorce) Act 1976 which provided for rescission or setting aside of *decree nisi*. A
- (iv) The cancellation of the *decree nisi* had changed the status of the appellant who has since remarried to someone who committed bigamy.

Ground No. (i)

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[19] The facts revealed attempts were made by the process server to serve the divorce petition and other cause papers personally on the respondent at the last known address of the respondent at No. 42C, Jalan Desa Bakti, Taman Desa, Kuala Lumpur, but was unsuccessful. The appellant then applied and obtained a court order dated 15 September 2009 to serve the divorce petition on the respondent by way of substituted service. The court order dated 15 September 2009 was duly complied with by the appellant by posting a copy of the divorce petition on the court notice board and at the last known address of the respondent at No. 42C, Jalan Desa Bakti, Taman Desa, Kuala Lumpur and a notice of the petition was advertised in the English newspaper "The Star". C D

[20] The first prayer prayed for by the respondent in his application in encl. 36 is for the setting aside of the order for substituted service dated 15 September 2009. It is the respondent's contention that at the material time, the appellant knew the respondent was staying in Pulau Pinang as well as the respondent's address in Pulau Pinang; that it is illogical for him to stay at No. 42C, Jalan Desa Bakti, Taman Desa, Kuala Lumpur as the premises was used as a tuition centre by the appellant and the appellant had changed the keys to the said premises. In para. 32 of his affidavit-in-support (RR Jilid 1), the respondent averred: E

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32. Pada setiap masa material, pempetisyen mempunyai pengetahuan terperinci bahawa saya tinggal di Pulau Pinang dan alamat surat menyurat saya adalah No. 100-2-3A, Jalan Bukit Kukus, Ayer Hitam, 11060 Ayer Hitam, Pulau Pinang iaitu alamat adik perempuan saya di Pulau Pinang.

[21] The respondent's averment is denied by the appellant. It falls on the respondent to prove the appellant knew his address in Pulau Pinang. This the respondent failed to do. The respondent did not produce any document or short message services ("SMS") to the appellant containing his address in Pulau Pinang in court to support his contention. What was produced in court was SMS for the year 2015/2016 by which time the divorce proceedings is already over and the SMS also did not contain the respondent's address in Pulau Pinang. As such, the respondent has failed to prove that the appellant knew his address in Pulau Pinang. This being the case, the appellant had no choice but to serve the petition by substituted service. G H

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A [22] On the issue of service, the learned High Court Judge found as a fact that the respondent confirmed that property No. 42C is a matrimonial home purchased by him and he once lived there. At para. [23] of her grounds of judgment, the learned High Court Judge said:

B [23] Alamat No. 42C, Jalan Desa Bakti, Taman Desa, 58100 Kuala Lumpur adalah alamat terakhir Responden yang diketahui Pempetisyen mengikut daftar alamat bertarikh 13.8.2009 dari Jabatan Pendaftaran Malaysia. Mahkamah ini mendapati Pempetisyen telah menyempurnakan serahan Petisyen Perceraian sebagaimana Perintah Mahkamah.

C [23] Given the circumstances of the case, we are of the considered view that the court order for substituted service is proper and valid. It must therefore follow that service of the petition and other cause papers on the respondent is proper.

Ground No. (ii)

D [24] It is not disputed that the respondent filed encl. 36 after more than seven years from the date the *decree nisi* was made absolute on 3 September 2010. This application also came about after the appellant put up a signboard to sell the matrimonial property at No. 42C, Jalan Desa Bakti, Taman Desa, Kuala Lumpur on 29 March 2017.

E [25] The respondent admitted that he knew about the divorce from his son, Ang Chuan Lek sometimes at the end of year 2015 and not in 2017. This is evident in para. 5 of his affidavit-in-reply (RR Jilid 1) wherein he states as follows:

F 5. Pada persekitaran akhir tahun 2015, saya telah mendapat tahu daripada anak lelaki Ang Chuan Lek yang mana sesungguhnya percaya isteri saya telah menceraikan saya secara senyap dan secara berahsia.

G [26] Despite knowing about the divorce in 2015, the respondent only filed the application two years later, in 2017 purportedly after he was served with all the relevant documents. His explanation was accepted by the learned High Court Judge.

H [27] Before us, learned counsel for the appellant argued Law Reform (Marriage and Divorce) Act 1976 is a specific law. It is submitted that the respondent cannot use the provisions of setting aside default judgment under O. 13 of the Rules of Court 2012 to set aside the *decree nisi*. Having decided that service is proper, it is submitted that the learned High Court Judge had erred in accepting the respondent's explanation.

I [28] In response, learned counsel for the respondent submitted there is no delay because the respondent was never served with the *decree nisi* and the *decree nisi* absolute until today (as at the day this appeal was heard on 23 November 2020).

[29] After hearing the parties' submission, we are not in agreement with the respondent. We agree with the appellant's submission that the respondent who had constantly in contact with his son must have known about the divorce much earlier than the year 2015. But the respondent did nothing. From the date the *decree nisi* was granted on 2 June 2010 to the date of the application on 8 December 2017, we agree there is an inordinate delay of more than seven years. It is trite law that the court will not lend assistance to a litigant who slept on his right.

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Grounds No. (iii) And (iv)

[30] The relevant provisions of the law on setting aside the *decree nisi* is provided for in s. 61 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act"). It reads as follows:

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61. *Decree Nisi* and proceedings thereafter

- (1) Every decree of divorce shall in the first instance be a *decree nisi* and shall not be made absolute before the expiration of three months from its grant unless the court by general or special order from time to time fixes a shorter period.
- (2) Where a *decree nisi* of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court and on that application, the court may:
 - (a) notwithstanding the provisions of the last foregoing subsection, make the *decree nisi* absolute;
 - (b) rescind the *decree nisi*;
 - (c) require further inquiry; or
 - (d) otherwise deal with the case as it thinks fit.

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[31] Learned counsel for the appellant submitted that the High Court Judge had erred in setting aside the *decree nisi* dated 2 June 2010 and the *decree nisi* absolute dated 3 September 2010 when there is no statutory provisions which provides for the *decree nisi* to be set aside after it has been made absolute. As to the effect of s. 61 of the Act, we were referred to the case of *Wong Cheng Ping v. Chin Guan Seng* [2010] 10 CLJ 743; [2010] MLJU 226, wherein Yeoh Wee Siam JC (as she then was) held:

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There is no provision in the Act for rescinding or setting aside a *decree nisi* that already has been made absolute. It appears to me that it is the intention of Parliament to preserve the integrity and finality of a *decree nisi* that already has been made absolute after 3 months. As such, parties are not allowed to freely apply to the Court at any time to rescind or set it aside unless for very good reasons or in exceptional circumstances.

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A [32] We agree and adopt the above principles as the correct statement of the law.

B [33] Learned counsel for the appellant submitted that by setting aside the *decree nisi* which was made absolute seven years ago, the High Court Judge has: (i) made an order in defiance of the statute; and (ii) unduly altered the position of the appellant and compelled her to commit bigamy which is in contravention of s. 7 of the Act.

C [34] In response to the appellant's submission, learned counsel for the respondent submitted that the *decree nisi* was obtained in dishonest manner and in no circumstances should be allowed to stand. It is submitted that the appellant had abused the court's process and managed to steal and snatch everything from the respondent and prevented him from seeing his only daughter. It is further submitted that the appellant re-marry when the respondent's application had not been disposed yet.

D [35] In her grounds of judgment, we noted that the sole reason why the learned High Court Judge set aside the *decree nisi* is because she finds the respondent had defence on merits.

[36] In para. 35 of the respondent's "cadangan petisyen balas", the respondent pleads as follows:

E 35. Petisyen ini difailkan oleh Pempetisyen untuk membubar perkahwinan di antara Pempetisyen dan Responden walaupun Pempetisyen adalah punca perkahwinan ini tidak dapat diperbaiki atau diselamatkan dan kelakuan Pempetisyen bersama teman lelakiinya iaitu Bennet Lopez mengakibatkan perkahwinan ini tidak dapat dipulihkan.

F [37] To us, para. 35 above show the respondent agrees that the marriage has irretrievably broken down and could not be saved. That the respondent can see their marriage is over with the presence of a third party. That the time has come for the respondent to accept the fact that their marriage should be dissolved no matter what his terms are. The appellant has re-marry someone else. The parties have been living apart for more than ten years (from 2008 until now). The delay in approaching the court. On top of that both the appellant and the respondent is now in their ripe old age of 70 years old. How much longer can both of them lived. We were of the considered view that these are the relevant factors that the High Court Judge should have taken into account before setting aside the *decree nisi* and *decree nisi* absolute. To us, for the appellant to start again the divorce proceedings for the second time is unduly harsh and unfair. Given the circumstances the appellant is in, we are of the view that the respondent had no good reasons to set aside the *decree nisi* and *decree nisi* absolute. On this ground alone, we took the view that the learned High Court Judge had erred in setting aside the *decree nisi* and *decree nisi* absolute.

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[38] The central issues in dispute between the parties are the custody, care and control of Ang Shin Jee; the joint equal ownership of property No. 42C, Jalan Desa Bakti, Taman Desa, Kuala Lumpur and a Kancil car No. WHE 5671. It is not disputed that *via* the court's order dated 2 June 2010, the appellant had taken away the respondent's car and part of the respondent's equal share to the matrimonial property and had denied the respondent access to his only daughter. It is obvious to us that the order is unfair to the respondent. In a situation like this, the respondent is not without a remedy. He is at liberty to apply to the court to vary the court order for custody or maintenance under s. 96 of the Act which reads as follows:

96. Power for court to vary orders for custody or maintenance

The court may at any time and from time to time vary, or may rescind, any order for the custody and maintenance of a child on the application of any interested person where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material changes in the circumstances.

Our Decision

[39] For the aforesaid reasons, we find there is merit in the appeal. We find the learned High Court Judge had erred in setting aside the *decree nisi* and *decree nisi* absolute when there is inordinate delay and no good reasons to set aside the same. We therefore allow the appeal and set aside the High Court order dated 17 April 2019. The *decree nisi* dated 2 June 2010 and the *decree nisi* absolute dated 3 September 2010 is reinstated. We further ordered that the respondent is at liberty to apply to court under s. 96 of the Act to vary the court order on custody and maintenance of the special need child, Ang Shin Jee.

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